SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 31 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 618

CLIFFORD GOWDY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

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SUBJECT INDEX

1. Conflict between the decision of the Court of Appeals, the Federal Tort Claims Act and the law of the place (Michigan) 1
2. The Court of Appeals decision totally unsupported by the evidence 3
3. Certiorari sought for the most profound policy reasons 6

INDEX TO AUTHORITIES CITED

Cases

Dalehite, et al. v. *United States,* 346 U.S. 15, 73 S. Ct. 956 (1953) 7, 8
Gerkin v. *Brown and Sehler Co.,* 177 Mich 45, 143 NW 48 (19B) 5
Gowdy v. *United States,* 271 F. Supp. 733 (1967), reversed 412 F 2d 525 ..... 2, 7
Hess v. *United States,* 361 U.S. 314, 80 S. Ct. 341 (1960) 7
Indian Towing Co. v. *United States,* 350 U.S. 61, 76 S. Ct. 122 (1955) 7
Lipka v. *United States,* 369 F 2d 288, Cert. denied 387 U.S. 935, 87 S. Ct. 2061 (1967), petition for rehearing denied 388 U.S. 925, 87 S. Ct. 2129 (1967) 8
McCord v. *U.S. Gypsum Co.,* 5 Mich. App. 126, 145 NW 2d 841 (1966) 2, 3, 4, 7
Rayonier Inc. v. *United States* 352 U.S. 315, 77 S. Ct. 374 (1957) 7
Vannoy v. *City of Warren,* 15 Mich. App. 158, 166 NW 2d 486 (1969) 3

Texts

	Page
Prosser on *Torts*, 3rd ed.	5

Statutes

28 USC 1346 (b)	2

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner seeks a rehearing of his Petition for Writ of Certiorari for the following reasons:

1. The Solicitor General, in his Memorandum In Opposition to the Writ, while agreeing that a question was presented as to whether or not the Court of Appeals properly set aside as "clearly erroneous" the District Court's findings that the government was negligent and that the Petitioner was not contributorily negligent, proceeded to

thoroughly misrepresent every important fact by omission or commission.

The Solicitor General and the Court of Appeals have chosen to ignore the vast social implications of their position: the questions presented in this case concern *safety* and the *responsibility for safety* in the construction industry, nothing less. The District Court said:

> "Knowledge of *construction, maintenance and repair of lighthouses* or navigable waters and the dangers inherent in their conditions and environs is *uniquely within the cognizance of the United States and precisely within the jurisdiction of the Coast Guard.* The United States should have anticipated harm to invitees using the second deck of the lighthouse, *despite the invitee's knowledge of its dangerous conditions.*" (Emphasis supplied) 271 F. Supp. at 745.

Given these elements of knowledge and jurisdiction (ownership), the United States was negligent *under Michigan law* by not providing guard rails. *McCord* v. *U. S. Gypsum Co.*, 5 Mich. App. 126, 145 N.W. 2d 841 (1966). It is extremely significant that the Solicitor General not only ignores *McCord* but does not cite one Michigan case regarding the substantive law governing this matter.

Most important, the refusal by the Court of Appeals to follow *McCord* and Michigan law in this case creates a conflict between the law of the Court of Appeals and Michigan substantive law. This conflict, in turn, violates the clear mandate of the Federal Tort Claims Act, which holds the United States liable

> "... if a private person, would be liable to the claimant *in accordance with the law of the place where the act or omission occurred.*" 28 USCA 1346 (b) (Emphasis supplied.)

Clearly, under "the law of the place where the act or omission occurred" (Michigan), a private person would be liable under the present situation. *McCord* v. *U. S. Gypsum Co., supra; Vannoy* v. *City of Warren,* 15 Mich. App. 158, 166 N.W. 2d 486 (1969). The decision of the Court of Appeals in this case creates a distinction between the United States and "private persons" in like situations which the Legislature clearly intended to avoid when it drafted the Federal Tort Claims Act.

The Solicitor General also knew that the version of the facts he was suggesting to the Court as proof of contributory negligence was a physical impossibility. He misrepresented to the Court that the Petitioner was a foot taller than the six foot height the trial court could see by observation and two feet taller than the Court of Appeals could find by judicial notice.

2. The Solicitor General misrepresented that a "safety line or belt" would be in any way a proper protective measure for the petitioner, when he knew that the trial testimony showed that *only* a guard rail would provide adequate safety protection in this situation, and that any other measure would be inadequate.

Frederick F. Bisel, civilian safety engineer *for the United States Coast Guard* from September 15, 1948, to December 30, 1965, testified that the second deck of the lighthouse was an unsafe working area, *absent guard-rails.* Bisel testified that the Engineering Manual of the U.S. Army, a primary source for regulations and procedures used by the Coast Guard, specifically required elevated surfaces to be protected by guard rails.

Rejecting the decision of the District Court, the Court of Appeals found that the lower court "was unduly impressed by the testimony of two former employees of the

government," including the testimony of Mr. Bisel. The Court of Appeals does not explain why it it finds the District Court "was unduly impressed," and this failure by the Court of Appeals is extremely important for two specific reasons: a) Defendant presented no testimony to rebut the two Government experts and b) the trial court, and the trial court alone, was in a position to judge the credibility and weight to be afforded testimony presented by witnesses.

Even more important, the Court of Appeals attempts to leave the impression that the machinery room roof was not an ordinary work area and, therefore, the United States had no obligation to protect against known and obvious dangers. The evidence simply will not support such a conclusion.

The United States contracted with Whittaker Electric Co. to completely replace and renew the foghorn and light on the lighthouse. The only means of reaching the top of the tower, on which the foghorn and light are mounted, *is by way of the machinery room roof.* Further, Whittaker employees were required by the Coast Guard to remove and then replace the steel door of the machinery room at the beginning and end of each working day. This could only be accomplished *by working on the machinery room roof.*

Thus, the Court of Appeals' conclusion regarding the roof as a work area is *totally* unsupported by the evidence.

Further, Michigan courts have specifically held that neither the duty to keep premises safe nor the duty to give notice of dangerous conditions may be delegated. *McCord v. U. S. Gypsum Co., supra.* But, the Solicitor General and the Court of Appeals conveniently ignore Michigan law, the law of the place, and refuse to follow the legislature's mandate in the Federal Tort Claims Act. Nevertheless, the facts cannot be escaped. Under Michigan law, the United

States was obligated to place guard rails around the machinery room roof once it was established that this was the only manner in which to keep the premises safe and protect Whittaker employees from the type of injury Petitioner sustained.

The Solicitor General, misrepresented to this Court that reasonable care on the part of the petitioner could have prevented the injury when the trial testimony established that the "United States should have anticipated harm to invitees using the second deck of the light house, *despite the invitee's knowledge of its dangerous conditions.*" (emphasis supplied) In short, given the United States' unique knowledge of the dangers involved, and the additional knowledge that reasonable care by individuals working on the second deck could not, in fact, provide adequate safety protection, the United States was negligent in not providing guard rails.

The Solicitor General failed to admit to this Court that the Court of Appeals had misread the record when it found no exercise of control by the government, despite the government's specific requirement that the steel door be removed and replaced every day.

The Solicitor General failed to admit to this Court that the Court of Appeals was in error when it refused to follow the Michigan law as expressed in *Gerkin* v. *Brown and Sehler Co.*, 177 Mich. 45, 143 NW 48 (19B) that superior knowledge is a factor in determining the negligence of an actor. This is still another example of the refusal by the Court of Appeals to apply Michigan law in this case. It is important to point out that Dean Prosser specifically cites *Gerkin* regarding the superior knowledge doctrine in his monumental work. See Prosser, *Law of Torts* 164.

3. Petitioner fully realizes that this Court has no duty to grant certiorari just because there has been a gross miscarriage of justice. Certiorari is sought rather on the most profound policy considerations.

Construction workers in this country suffer twenty-eight hundred deaths and 250,000 disabling injuries every year. To prevent this mass slaughter of construction workers, the legislatures of the various states have enacted safety codes with criminal sanctions, requiring owners and contractors to install safety devices and use preventive measures. One must recognize, as the legislatures have recognized, that if proper safety procedures were followed then deaths and injuries simply would not occur at the present level; that is the state of the art of safety engineering.

Gowdy was a 40 year old worker earning as much as $10,000.00 a year in 1965; now he is a 44 year old shell of a man who will never work again. The question for the Supreme Court is how this tragedy could have been prevented. The Petitioner respectfully submits that the simple answer is that, had the Coast Guard spent the minimal money necessary to install guard rails, Mr. Gowdy would still be working today. The criminal law has never forced anyone to use proper safety procedures; humanitarian ideals on the part of the government or construction companies certainly offer no hope that these injuries and deaths will be stopped.

Under our present legal structure, there is one very viable alternative readily accessible to the judges of this country; if the government refuses to use proper safety procedures or refuses to insist that its contractors use proper safety procedures and if a death or serious injury results, then the government must pay for that serious injury or death. This is exactly the law of the State of Michigan. The Coast

Guard's own safety director, witness Bisel, said on the record that he pleaded with the government to utilize preventive safety procedures, including guard rails. Michigan law makes guard rails a necessity in this situation. *McCord* v. *U.S. Gypsum Co. supra.* How then could the Court of Appeals deny liability for Mr. Gowdy's injury?

The consequence of denying liability for these injuries and deaths, is that there is no incentive anywhere to use the knowledge presently available to prevent injury and death of construction workers. The Petitioner respectfully submits that all other attempts to bring about safe places to work have failed; the criminal law is no sanction. Mr. Bisel and his counterparts can plead forever but safety engineering will never be utilized until tort liability results *whenever the government insists on being unsafe.*

Dalehite v. *United States,* 346 U.S. 15, 73 S. Ct. 956 (1953) has been read by most lower federal courts as granting a legal license for the government to kill and maim industrial workers. It has been read to allow the government to hire careless contractors, provide inadequate safety regulations in the bid specifications, allow sloppy performance, approve negligent design plans, allow the employment of careless sub-contractors, provide negligent inspection. The result of *Dalehite* is death and injury of construction workers.

This is not to say that *Dalehite* should be interpreted in that manner and this Court attempted to stop that interpretation in *Indian Towing Co.* v. *United States,* 350 U.S. 61, 76 S. Ct. 122 (1955); *Rayonier Inc.* v. *United States,* 352 U.S. 315, 77 S. Ct. 374 (1957) and *Hess* v. *United States,* 361 U.S. 314, 80 S. Ct. 341 (1960).

Gowdy and scores of other Federal Tort Claims decisions since 1960 are proof positive that the lower federal courts

still read *Dalehite* as finding a legal license to kill. The fact that the Solicitor General would cite it in this case, shows its impact.

When this Court declined to grant certiorari in *Lipka* v. *United States*, 369 F 2d 288, cert. denied 387 U.S. 935, 87 S. Ct. 2061 (1967), petition for rehearing denied 388 U.S. 925, 87 S. Ct. 2129 (1967), the Justice Department and lower courts read that act as a renewal of the license which was thought to have been granted in *Dalehite*.

This language may sound extreme but the situation is extreme. This injury could have been prevented by guard rails. Nevertheless, the Court of Appeals removes liability from the federal government even though Michigan law now imposes that liability on all owners within the State of Michigan; it removes liability from the Coast Guard even though the Coast Guard *knew* that this injury did not have to occur and would not have occurred if the Coast Guard had taken proper safety measures. Mr. Bisel told the Coast Guard in 1963 that guard rails were an absolute necessity for all elevated surfaces.

It might be well for the members of the Court to place themselves in the position of the ethical and responsible advocate who is called upon to represent the injured worker or the widow of a worker who has been killed because a principal undertaking construction desired to save a few dollars as the Coast Guard did in the case at bar.

If the Court desires *Dalehite* to be interpreted as it is in Gowdy with its resulting slaughter of construction workers, then it should only do so after a hearing. If five members of this court are willing to grant a legal license to kill construction workers, they should only do so after a hearing. If five members of this court desire *Dalehite* to be inter-

preted differently, then the Court need only reverse per curiam.

RELIEF SOUGHT

Certiorari should be granted.

Respectfully submitted,

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Dated: Detroit, Michigan
December 30, 1969.

(Title of Court and Cause)

STATE OF MICHIGAN
COUNTY OF WAYNE } ss.

I, HARRY M. PHILO, attorney for the above named petitioner do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

DATED: December 30, 1969

HARRY M. PHILO
Attorney for Petitioner
2761 East Jefferson Avenue
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Subscribed and sworn to before me
this 30th day of December, A.D. 1969
JIMMIE NELL HUNT, Notary Public,
Wayne County, Michigan
MY COMMISSION EXPIRES: October 19, 1971